

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0339



In re:

ACTION WILDLIFE FOUNDATION, INC.,

Respondent.

Before: Administrative Law Judge Janice K. Bullard

Appearances:

Sharlene Deskins, Esq., for Complainant
John R. Williams, Esq., for Respondent

DECISION AND ORDER

I. INTRODUCTION

The above captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Complainant”), against Action Wildlife Foundation, Inc. (“Respondent”; “Action Wildlife”). Complainant alleges that Respondent violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; “the Act”), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; “Regulations and Standards”). The instant decision¹ is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

Procedural History

¹In this Decision & Order, the transcript of the hearing shall be referred to as “Tr. at [page number]. Complainant’s evidence shall be denoted as “CX-[exhibit #]” and Respondents’ evidence shall be denoted as “RX-[exhibit number]”. Exhibits admitted to the record sua sponte shall be denoted as “ALJX-[exhibit number]”.

In a complaint filed on April 6, 2012, ("the Complaint") Complainant alleged that Respondent willfully violated the Act and the Regulations on multiple occasions between 2007 and 2009. Generally, the Complaint alleged that Respondent failed to properly handle and care for a variety of animals; failed to maintain proper records; failed to maintain adequate plans of veterinary care, disease control and euthanasia; failed to adequately maintain facilities in a variety of circumstances; failed to provide structurally sound facilities; failed to employ adequate numbers of properly trained employees; failed to properly store supplies and food; and exhibited animals without sufficient barriers.

Respondent timely filed an Answer and the parties exchanged evidence and filed submissions. Complainant moved for a Decision on the Record, and by Order issued August 12, 2012, I deferred ruling on the motion and allowed Respondent's counsel to supplement Respondent's responses and submissions. I hereby deny the motion, finding sufficient dispute regarding certain material facts.

A hearing was held beginning on January 29, 2013, in Wallingford, Connecticut. Over the course of the two day hearing, I admitted to the record the exhibits proffered by both Complainant (CX-1 through CX-12) and Respondent (RX-1 through RX-128)². Complainant timely filed written closing argument on May 6, 2013. Respondent did not file closing argument. The record is closed and this matter is ripe for adjudication.

I. ISSUE

Did Respondent violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?

² Respondent withdrew exhibit RX-129. Tr. at 242.

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of Factual History

James Mazzarelli is a businessman who founded the non-profit Action Wildlife Foundation, Inc. as a means to provide the state of Connecticut with a facility like the Catskill Game Farm in New York, which he has loved since he was a boy. Tr. at 77-78. Mr. Mazzarelli collected items to display in a museum on property he had purchased, and eventually purchased animals and opened the facility as an exhibit approximately fourteen (14) years ago. Tr. at 78. The exhibition is open from April through October. Tr. at 79. The costs of the operation are largely borne by Mr. Mazzarelli, who is President of the corporation. Tr. at 79-80; 253. He has authority to hire and fire people. Respondent donates the use of his facility to a number of other non-profit organizations for recreational and fundraising purposes. Tr. at 80.

Action Wildlife is supervised by a board of four members, none of whom have particular experience with or knowledge about animals. Tr. at 252; 333. Respondent purchased many of its animals from Catskill Game Farm, including an aoudad which was sick with wasting disease when it was acquired. Tr. at 81-82. The animal died despite treatment, and one animal that contracted the disease was euthanized by gunshot. Tr. at 82-84. Respondent consults its veterinarian about the method to use to euthanize animals. Tr. at 84.

Respondent acknowledged that inspections by APHIS had disclosed some problems with the facility, but Mr. Mazzarelli attributed many of the deficiencies to poor management by his supervisor, Jessica Supranovich. Ms. Supranovich was a veterinarian technician who was responsible for taking care of the facility on a part time basis. Tr. at 87-90; 256. Ms. Supranovich failed to oversee needed repairs, and failed to have animals vaccinated, while representing that she had. Tr. at 88-90. She brought a rabbit to the premises without permission.

Tr. at 165-166. Respondent dismissed Ms. Supranovich and replaced her with Mike Matson, who had worked under her supervision. Tr. at 90-91.

Mr. Mazzarelli disagreed with many of the conclusions of inspections, and believed that the facility was designed to meet the regulations. Tr. at 91-103. He does not give as much attention to maintenance of fences during the winter when the facility is closed because the ground is frozen and “nothing can get in or out.” Tr. at 103.

Mr. Mazzarelli admitted that he had learned about animal aggression through experience, and described problems that he had encountered with a male red deer that killed thirteen (13) female animals and a male llama that castrated another male. Tr. at 107-108; 282. He resolved the red deer problem by removing the males’ antlers at an appropriate time. Tr. at 109. He felt no need to build shelters that animals would not use or would knock down, as did the four-horn sheep. Tr. at 116-120. He explained that those animals ram everything, including each other; four animals had their spinal columns severed after ramming each other. Tr. at 120. Respondent resolved that problem by having only one large dominant animal in the herd, to eliminate contests over females. Tr. at 121.

Mr. Mazzarelli is not always at the facility as he spends the majority of his time overseeing his businesses and at his home in Florida. Tr. at 142. Mr. Mazzarelli personally performs some maintenance projects like burning excess foliage and gathering hay. Tr. at 369; 371.

At the time of the hearing, Respondent was retooling its fences and moving gates to allow easier access to visitors and improve barrier fencing. Tr. at 247. Mr. Mazzarelli testified that the APHIS inspector who replaced Jan Baltrush has not cited him with many violations compared

with Ms. Baltrush. Tr. at 248. The current inspector has no problem with conditions that Inspector Baltrush had cited, such as open gates during the daytime. Tr. at 249.

Mr. Mazzarelli believed that the facility depended on the money he spends to keep Action Wildlife a going concern. Tr. at 254. Though he acknowledged that Action Wildlife does not have enough money without his contributions, he denied that lack of money was a cause of any facility maintenance or other problems. Tr. at 254-255. Mr. Mazzarelli was unaware that Action Wildlife had been cited for violations of the Act and regulations in 2007 and 2008, because he counted on his facility manager to address any issues raised by inspections, and learned much later that she had failed to do so. Tr. at 255-256.

Action Wildlife employs three people in the winter to feed and water the animals and do necessary repairs, but employs more people in the summer when the museum and grounds are to visitors. Tr. at 267. Mr. Mazzarelli could not say how many animals were on display at Action Wildlife, but agreed that at least 150 animals were kept there. Tr. at 268. He believed that Respondent was sufficiently staffed to feed and water animals, and described how it took about five hours for two people to load the feed in a truck and bring it to the animals. Tr. at 268-269. If an animal needs care, a veterinarian is called. Tr. at 269.

B. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure that they are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is authorized to promulgate regulations to govern the humane handling and transportation of animals by 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140.

Violations of the Act by licensees may result in the assessment of civil penalties, and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a \$2,500 maximum, between April 14, 2004 and June 17, 2008, the maximum for each violation was \$3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation had been increased to \$10,000.

Implementing regulations provide requirements for licensing, recordkeeping and attending veterinary care, as well as specifications and standards for the humane handling, care, treatment and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The regulations set forth specific instructions regarding the size and environmental requirements of facilities where animals are housed or kept; the need for adequate barriers; the feeding and watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people. Id.

C. Discussion

1. Cited Violations

APHIS cited Respondent with violations of the Act and regulations that I shall discuss by category as follows:

Attending veterinarian and adequate veterinary care

Exhibitors are required to employ “an attending veterinarian under formal arrangements which include a written program of veterinarian care and regularly scheduled visits to the premises.” 9 C.F.R. § 2.40(a). The program of care must demonstrate “the availability of appropriate facilities, personnel, equipment, and services. . . ; the use of appropriate methods to prevent, control, diagnose and treat diseases and injuries and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being . . . with a mechanism of direct and frequent communication [with] the attending veterinarian; adequate guidance to personnel involved in the care and use of animals regarding handling; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.” 9 C.F.R. § 2.40(b)(1)-(5).

Complainant has charged Respondent with failure to maintain programs of disease control and prevention, euthanasia and adequate veterinary care for its animals in violation of 9 C.F.R. § 3.40. APHIS inspector Jan Baltrush cited Respondent with failing to meet the requirements of the Act and regulations in this regard at each inspection considered in this adjudication: March 27, 2007; January 8, 2008; August 19, 2008; and February 3, 2009. CX-1 through CX-8. Inspector Baltrush holds a Bachelor’s of Science degree in veterinary technology and has worked for APHIS since 1988 as an animal care inspector. Tr. at 21-22. She was assigned responsibility for inspecting Respondent’s facility when it opened in 1998 or 1999 and inspected the premises until 2009, when Inspector Stephen Neusbaum took over. Tr. at 23; 63.

Ms. Baltrush testified that at her inspection on August 19, 2008, an employee named Luis accompanied her around the facility. Tr. at 31-32. She recalled seeing a young elk in the facility’s milk barn that was thin and had a rough coat. Tr. at 32. The inspector believed that the elk should have been seen by a veterinarian, but Respondent had no records of veterinarian

treatment. Tr. at 32-33.³ Mr. Mazzarelli admitted that Respondent did not consult a veterinarian when the red deer known as “the Terminator” killed other deer. Tr. at 284. Respondent did not consult an animal behaviorist. Tr. at 341. The Terminator continued to kill other red deer until the animal died. Tr. at 282. Respondent eventually decided to remove red deer antlers to prevent similar deaths from other red deer. Tr. at 338.

Mr. Mazzarelli testified that he was not familiar with the facility’s current plan for disease control and prevention, or with the facility’s plans for the years 2007 to 2009. Tr. at 260. Mr. Mazzarelli stated that no one on Respondent’s Board had a background in animal husbandry. Tr. at 333-334. When the red deer known as the Terminator was found dead, no one consulted a veterinarian to determine the cause of death. Tr. at 344. Although Mr. Mazzarelli did not know the life expectancy of a red deer, he believed that white tail deer live an average of seven or eight years and the dead red deer had been with Respondent for ten to eleven years. Id. Respondent’s nelgai also was found dead of what Mr. Mazzarelli presumed to be “old age”, and no veterinarian was consulted. Tr. at 345.

Mr. Mazzarelli was unfamiliar with the term “necropsy” (Tr. at 344), and I therefore conclude that Respondent had never requested a necropsy after any of its animals had died. Although the regulations do not require necropsy to determine the cause of death of animals, the deaths of animals without any documented medical condition, treatment, or diagnosis casts suspicion on the adequacy of the facility’s plan of veterinary care.

At her inspection conducted on February 2, 2009, Ms. Baltrush cited Respondent with failure to maintain an adequate program of veterinary care that included an approved method of

³ Although a recordkeeping violation of 9 C.F.R. § 2.125 was cited in the inspection report dated August 19, 2008, Respondent was not charged with violating this regulation in the Complaint.

euthanasia. CX-7; CX-8. Ms. Baltrush testified that she had concerns that a red deer had injured another and had killed other red deer. Tr. at 43-44. A male elk had killed another in its pen, and she learned that animals had been euthanized by gunshot. Tr. at 44. Ms. Baltrush explained that euthanization by gunshot was not an approved method, other than in an emergency. Id.

Respondent had advised Ms. Baltrush that animals had been shot to be served as meat for human consumption at a function sponsored by Respondent. Tr. at 44-45.

Mr. Mazzarelli testified that a Scottish Highlander that was dying of wasting disease was “put . . . down with a bullet”. Tr. at 259. Mr. Mazzarelli did not know if gunshot was the euthanization method incorporated in the facility’s veterinarian plan. Tr. at 261. Respondent’s attending veterinarian, Dr. Christopher Weber, believed that gunshot was an approved method of euthanasia that would comply with 9 C.F.R. § 2.40(b)(4) when specific standards were followed. Tr. at 432. However, Dr. Weber stated that he did not use gunshot to euthanize animals. Id. Dr. Weber has been the facility’s veterinarian since 2010, and there had been no breakout of disease during his tenure. Tr. at 425. He believed the animals were well cared for. Id. Dr. Weber confirmed removing red deer horns and he testified that he did not consider old age a diagnosis for death. Tr. at 435. He has treated old animals for health conditions. Id.

Mr. Matson testified that he has shot animals for Respondent, and he did not know whether a veterinarian had been contacted or examined sick animals before he shot them. Tr. at 466.

I take official notice that APHIS has adopted the American Veterinary Medicine Association’s Guidelines on Euthanasia from 2007, and posted those guidelines on its public access website at <http://www.nal.usda.gov/awic/pubs/Euthanasia07/animal>euthanasia.shtml>. (“the Guidelines”). The Guidelines describe the correct method of using gunshot for euthanasia,

and make it clear that it is not a preferred method. The Guidelines provide that “[g]unshot should not be used for routine euthanasia of animals in animal control situations”. The Guidelines allow that “gunshot may at times be the most practical and logical method of euthanasia of wild or free-ranging species”, and that “[when other methods cannot be used, an accurately delivered gunshot is a conditionally acceptable method of euthanasia”. However, the Guidelines make it clear that other means are preferable.

The preponderance of the evidence establishes that gunshot is not an appropriate primary method of euthanasia for animals that are confined and exhibited, regardless of their wild nature.

The record demonstrates that Respondent failed to maintain an adequate plan of veterinary care that provided guidance to personnel about handling, tranquilizing and euthanizing animals in compliance with 9 C.F.R. § 2.40(b)(4).

Maintaining Animals in Compatible Groups

“Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.” 9 C.F.R. § 3.133. Further, 9 C.F.R. § 3.58 (a) mandates that “[r]abbits shall not be housed in the same primary enclosure with any other species of animals unless required for scientific reasons.” 9 C.F.R. § 3.58 (a).

The evidence is undisputed that animals at Action Wildlife are at risk of being killed by other animals. One red deer alone killed thirteen other red deer during its lifetime. Tr. at 281-283. It took years for Respondent to find a method to curb aggressive tendencies in the red deer it owns. Tr. at 282. Mr. Mazzarelli believed that Respondent’s veterinarian recommended the solution of removing the deer’s horns. Tr. at 339; 342.

Although Mr. Mazzarelli testified that he did not know that a red deer stag would kill females, and further maintained that he “didn’t have anybody [he] could ask because the vet wouldn’t even know about it” (Tr. at 282), the record reflects that years passed without anyone associated with Respondent seeking a solution to the killing, which continued during “the life of the ‘terminator’” (Tr. at 281). Despite his assertion that he was very knowledgeable about deer, Mr. Mazzarelli was nevertheless surprised when the Terminator repeatedly killed females and then its own yearling. Tr. at 282. Mr. Mazzarelli’s surprise continued through the deaths of thirteen red deer.

The four-horn sheep butted each other regularly, resulting in the severing of animals’ spinal column and death of animals. Tr. at 290-291. Mr. Mazzarelli attributed head butting to the “breeding process of sheep and “mother nature”. Tr. at 292. He did not believe that he should separate animals on the off chance that males might fight each other. Tr. at 293. However, Respondent now separates aggressive sheep to discourage the practice.

Respondent’s failure to separate aggressive animals from others of their species led to many animal deaths. Although Mr. Mazzarelli believed that the animals behaved according to their nature, he made no allowance for the fact that animals were penned in enclosures and could not avoid aggressive members of their species. This violation has been established.

Inspector Baltrush observed a newly acquired rabbit in a pen with pigs. Tr. at 33. Respondent did not dispute that a former employee brought the animal to the facility without authorization. Tr. at 164-165. Respondent is ultimately responsible for the acts of its agents and employees. The preponderance of the evidence establishes that Respondent failed to separate animals in a manner consistent with the regulations.

Handling of Animals

During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(c)(1).

At her inspection of January 8, 2008, Inspector Baltrush observed that the barrier fence in front of the Russian boar enclosure had been removed, presumably to allow Respondent to remove a tree that needed to come down. CX-3; CX-4. The allegation was not fully disputed, and I find that it has been established.

Facilities and Operating Standards

Many of the cited violations involved in the instant adjudication fall within the general penumbra of "facilities", and shall be addressed categorically.

Structural Strength

The pertinent regulation states that

[t]he facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

9 C.F.R. § 3.125(a).

Ms. Baltrush cited Respondent with failure to provide facilities of adequate structural strength because she observed holes in the cement wall in the barn housing the neltgai and oryx. CX-1; CX-2. Ms. Baltrush did not provide additional discussion about this allegation at the hearing. Mr. Mazzarelli explained that the holes that were visible were part of cement blocks, and that they would not provide a means of access for rodents or other vermin into the actual enclosure. Tr. at 94-95; 97. The holes had been there since the facility opened, and Respondent

had not been cited for a violation relating to them before March, 2007. Tr. at 95. Nevertheless, Respondent filled the cement block openings with additional cement. Id.

I find that the evidence is in equipoise and dismiss this charge.

After an inspection conducted on January 8, 2008, APHIS cited Respondent with failing to maintain housing facilities in good repair. CX-3; CX-4. Ms. Baltrush testified that the roof of the shed for the four-horn sheep was in disrepair and that defects in other animal housing structures had not been repaired. Tr. at 37. The inspector described holes in mesh in a deer pen; panels of fencing in the red deer pen that were becoming detached; and loose cables off the fence line at the elk pen. Tr. at 28-29.

Mr. Mazzarelli explained that the roof on the shelter for the four-horn sheep was built purposely on a slant because the animals repeatedly butted the original structure, which required repair. Tr. at 123-124. Since Respondent redesigned the structure, the animals have not destroyed the shed. Tr. at 125. The pictures depict a beam across the roof that is not in a state of disrepair, but was placed to stabilize the structure and allow animals to see the rest of herd from inside the shed. Tr. at 126-129.

I accord weight to Respondent's explanation and dismiss this allegation.

On August 19, 2008, Inspector Baltrush again observed problems with the deer pen and elk enclosure and observed loose cables and wires wrapped around a tree in Safari Land that animals could get caught in. Tr. at 32-35; CX-5; CX-6. On February 2, 2009, Ms. Baltrush conducted an inspection that revealed that the mesh remained detached in the fallow deer pen, and that posts were leaning in the Ibex enclosure and there were holes in the fence of the bison pen. CX-7; CX-8; Tr. at 45. Mr. Mazzarelli testified that these issues had been resolved when they were pointed out to Respondent. Tr. at 130-133. He also disagreed that the opening at the

bottom of the bison fence represented a problem, as no predator would attack a bison. Tr. at 277-278. I find that these allegations have been supported by the evidence.

Inspector Baltrush testified that a sugar glider that was kept inside the facility's museum was moved to a cage without a lock in an area without staff supervision. Tr. at 39. Most of the animals in the area where the glider was exhibited are not regulated under the Act, but since it had been moved, Ms. Baltrush noted its new location. Tr. at 40. Ms. Baltrush was concerned that the animal would escape from an unlocked cage and would not be detected because of its diminutive size. T. at 39-40. Mr. Mazzarelli testified that he did not know that the cage would be required to be locked, and observed that the animal would not leave the cage, nor be stolen. Tr. at 200-201. He described the animal as a nocturnal creature that lives within a kind of cocoon. Tr. at 201. A lock was placed on the cage in response to the inspection. Tr. at 202. Upon cross examination, Mr. Mazzarelli reluctantly agreed that an unlocked cage could be opened by museum guests, who could then touch the animal. Tr. at 376. This allegation has been established.

Storage of Food and Bedding

“Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.” 9 C.F.R. § 3.125(c).

During her inspection of Respondent’s facility on August 19, 2008, Ms. Baltrush observed opened bags of food in the grain food, which she cited as a violation because the food was open and on the floor and not in containers. CX-5; CC-6; Tr. at 43. Mr. Mazzarelli explained that the grain was generally stored near chutes, but the roof was unstable, and needed

to be repaired. Tr. at 249-250. I infer that during the period when the roof was damaged, the grain could not be stored as usual. This allegation is upheld.

Outdoor Facilities

Shelter from sunlight and inclement weather

Exhibitors are required to provide “for all animals kept outdoors [appropriate shelter] to afford them protection and to prevent discomfort to such animals. . .” 9 C.F.R. § 3.127(b).

Complainant cited Respondent for failing to provide appropriate shelter from inclement weather to red deer and elk. CX-1 through CX-8; Tr. at 33-34. Ms. Baltrush characterized the situation for the elk as chronic, because the existing shelter was insufficient to provide shelter for all of the elk. Tr. at 46. Ms. Baltrush explained that the topography of the elk enclosure provided no natural protection from the elements. Tr. at 49-51. The red deer also did not have sufficient shelter. CX-4. Mr. Mazzarelli testified at length that he did not believe that the elk needed additional shelters, noting that they did not use the one built within their enclosure. Tr. at 285-288. I accord more weight to Ms. Baltrush’s opinion and find that the evidence supports this violation.

Respondent was charged with lack of shelter for animals in the “safari area”, and Respondent pointed out that caves provided shelter. Tr. at 215. The evidence is in equipoise and this allegation is dismissed.

Drainage

A suitable method must be provided to rapidly eliminate excess water from outdoor housing facilities for animals. 9 C.F.R. § 3.127(c). On August 19, 2008, Ms. Baltrush found an accumulation of mud and feces near the shelters for boar, nelson, oryx and elk, which had attracted an accumulation of flies. CX-5; CX-6; Tr. at 35-36. Mr. Mazzarelli explained that boar

dig and wallow regularly, and he further noted that the animals had an inside shelter that was not muddy. Tr. at 156-158. He denied the accumulation of flies. Id. I accord weight to the evidence regarding flies, but the allegation does not refer to Respondent's plan for pest management. I find that the evidence is in equipoise on the issue of mud, and dismiss the allegation.

On February 3, 2009, Complainant cited Respondent for an excess of mud in the Scottish Highlanders and cow area. CX-7; CX-8; Tr. at 47-48. Respondent contended that the picture did not show mud, as the area appeared dry. Tr. at 192. However, Mr. Mazzarelli agreed that water would run downhill and accumulate. Id. I find that this allegation has been established.

Perimeter fence

The regulations mandate that "all outdoor facilities must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out." 9 C.F.R. § 3.127(d). The fence must be at least 8 feet high for potentially dangerous animals as identified by the regulations and must be constructed so as to protect the animals and "function as a secondary containment system." Id. The perimeter fence must be sufficiently distance from the primary enclosure "to prevent physical contact between animals inside the enclosure and those outside the perimeter fence" and fences less than 3 feet from the primary enclosure must be approved by APHIS. 9 C.F.R. § 3.127(d).

At each inspection relevant to this adjudication, Ms. Baltrush cited Respondent with failing to provide an adequate perimeter fence. CX-1 through CX-8. There were gates at one section of the perimeter fence that were open at each of the APHIS inspections. Tr. at 29; 60; 108. At her January 8, 2008 inspection, Ms. Baltrush observed the gates stuck open in snow drifts. Tr. at 30; 108. She saw gaps at the bottom of the fence, and on one occasion, goats had escaped to the road. Tr. at 30.

Mr. Mazzarelli testified that two people are in charge of closing the gates, and admitted that they did not always perform expected tasks. Tr. at 141-142. He disputed that the gates were part of the facility's perimeter fence, and he did not believe it was practical to shut the gates when the facility was open to the public during the day. Tr. at 142-143. Many people drive through the facility and he would need to hire a person whose sole duty would be to open and close gates. Tr. at 143. Mr. Mazzarelli had advised Ms. Baltrush that he would not keep the gates closed, and he had not always been charged with a violation pertaining the gates. Tr. at 144. His current inspector has not cited him for failing to close the gates during the day. Id.

The evidence substantiates that Respondent at times failed to close gates that would have kept animals in enclosures and away from the public. This violation has been established. I note that there was some testimony that the perimeter fence was being reconstructed, and this condition may now comply with the Act and regulations.

Watering

"If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary." 9 C.F.R. § 3.130.

At her inspection of August 20, 2008, Inspector Baltrush observed dirty water receptacles throughout most of the facility. CX-5; CX-6. Ms. Baltrush described "potable water" as water that people would not hesitate to drink from. Tr. at 37. Tubs throughout the facility contained water with algae that should have been emptied and scrubbed. Tr. at 38-39. Mr. Mazzarelli

refuted the idea that the water tubs were not clean, and he attested that he had enough employees to clean tubs. Tr. at 253-254. The evidence supports this violation.

Housekeeping

The regulations provide:

Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

At her inspection of August 20, 2008, Ms. Baltrush noted loose shingles on the roof and on the ground near the elk shelter that posed the risk of being ingested by the elk. CX-5; CX-6. At the hearing, Ms. Baltrush testified that missing shingles constituted violations of structural integrity, and not housekeeping violations. Mr. Mazzarelli testified that a roof missing shingles was not otherwise in disrepair, and that it would be costly to subdue animals so that such minor repair could be made. Tr. at 138. Although Ms. Baltrush testified that there were holes in the roof, the pictorial evidence does not fully support that. I accord weight to Ms. Baltrush's concern that animals could ingest fallen shingles, but I also accord weight to Mr. Mazzarelli's testimony regarding the danger of entering a pen to make minor repairs. I find that the evidence does not demonstrate that the missing shingles posed a structural defect, and to that extent, the allegation is dismissed. I find sufficient evidence to support a violation of housekeeping standards.

Respondent was cited with a housekeeping violation on February 3, 2009, because a roll of mesh used to repair a hole in the fence of the aoudad, sheep and goat pen was left in the pen. CX-7; CX-8. Ms. Baltrush testified that she was concerned that animals could be injured on the loose mesh roll. Tr. at 45. The preponderance of the evidence supports this allegation.

Employees

Exhibitors are required to use “a sufficient number of adequately trained employees. . . to maintain the professionally acceptable level of husbandry practices” required by the regulations. 9 C.F.R. § 3.132. “Such practices shall be under a supervisor who has a background in animal care”. Id.

Respondent was charged with not utilizing a sufficient number of adequately trained employees after an inspection conducted on August 19, 2008. CX-5; CX-6. Ms. Baltrush testified that her inspection had revealed numerous violations that she believed would not have occurred if Respondent had had more employees. Tr. p. 34-35. Ms. Baltrush acknowledged that her successor inspector had told her that conditions at Respondent’s facility had greatly improved since the farm manager that Ms. Baltrush knew, Jessica Supranovich, had been replaced by Mike Mattson. Tr. at 50-56.

It is clear from Mr. Mazzarelli’s testimony that he and other members of Respondent’s Board relied heavily upon employees to address deficits identified by APHIS inspectors and to consult with Mr. Mazzarelli about issues that the employees could not correct by themselves. Tr. at 85-88. Mr. Mazzarelli had no training in animal husbandry. Tr. at 458. When he was made aware that Ms. Supranovich did not make necessary repairs following inspections, failed to vaccinate animals, and had brought a rabbit to the facility without authorization, he terminated her employment. Tr. at 89-90; 165-166 . Mr. Mazzarelli believed that the operation of the facility has improved under Mike Matson’s management. Tr. at 91.

Mr. Matson stated in his affidavit dated August 24, 2012 that Mr. Mazzarelli is told only about problems that he cannot resolve. RX-4. When he took over as manager, he completed chores that his predecessor has failed to perform. Id.

Mr. Mazzarelli is opposed to hiring more individuals because of the costs, but his attempts to conserve budgetary resources was short-sighted, as many of the allegations charged in the instant matter could have been averted by the presence of capable and reliable employees. Recurring issues like gates being left open and careless maintenance reflect that Respondent would have benefitted by employing better trained, if not more, employees during the period covered by the instant adjudication. The fact that inspections conducted while the facility was managed by Mr. Matson disclosed few deficits supports this conclusion.

I find that APHIS has established by a preponderance of the evidence that Respondent failed to employ an adequate number of trained employees during the period encompassed by this adjudication.

D. Summary

Respondent failed to separate animals. Respondent failed to implement a proper plan of veterinary care, and failed to develop an approved plan for euthanizing animals. Records were not adequately maintained. Respondent's primary benefactor, James Mazzarelli, made the decisions that led to the unnecessary death of animals. Mr. Mazzarelli had no expertise in animal husbandry, and he failed to direct anyone working for Respondent to consult an expert in animal behavior regarding the repeated slaughter of red deer and four-horn sheep by others of their species. Respondent's failure to employ a sufficient number of well trained employees led to deficits in facility cleanliness, structural integrity and animal husbandry.

E. Sanctions

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. In re David M. Zimmerman, 56 Agric. Dec. 433 (1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the

person's good faith and history of previous violations. In re Lee Roach and Pool Laboratories, 51 Agric. Dec. 252 (1992). Moreover, it has been observed that the AWA is a remedial statute, and the purpose of imposing sanctions is for deterrence, not punishment. In re: David Zimmerman, 57 Agric. Dec. 1038 (1997). The recommendations of administrative officials responsible for enforcing a statute are entitled to great weight, but are not controlling, and the sanction imposed may be considerably less or different from that recommended. In re: Marilyn Shepherd, 57 Agric. Dec. 242 (1998).

The record establishes that Respondent willfully violated the Act on repeated occasions. Respondent failed to develop and follow a plan for veterinary care for animals that was based on established animal husbandry standards. Despite multiple deaths of red deer and four-horn sheep, Respondent failed to consult an animal behavior specialist and instead relied upon observation and trial and error.

It is undeniable that animals are unpredictable, but the animals at Action Wildlife were taken from their wild state and placed in unnatural conditions, constrained by fences and held with others of their kind that exhibited aggressive behavior. Once Respondent endeavored to exhibit animals under the auspices of an Animal Welfare Act license, Respondent tacitly agreed to make every effort to assure the safety and welfare of those animals. The record demonstrates that Respondent had limited knowledge about animal behavior in captivity and did little to modify the conduct of aggressive animals that harmed and killed other animals of their species.

Respondent's demeanor, testimony and written submissions reflect that Mr. Mazzarelli valued his own opinions about conditions at the facility over those of Inspector Baltrush. He admitted telling APHIS' representatives that he would not take certain actions that were recommended, such as fixing fence gaps at the bison enclosure, and building additional

structures for the elk. Mr. Mazzarelli insisted that gates could remain open, and that his concept of the perimeter fence was sufficient to meet regulatory standards. Although many of the recurring maintenance issues have been resolved due to the stewardship of Respondent's current manager, for years the facility was mismanaged under the direction of an individual who had little oversight and who allowed deficiencies to multiply.

Despite the corrections and improvements made at Respondent's facility, the frequent deaths of animals that might have been prevented by a better plan of veterinary care merits serious sanctions. I hereby adopt Complainant's recommendation to order Respondent to cease and desist those actions that violate the Act and regulations. I also find it appropriate to impose a civil penalty of \$30,000.00.

Complainant further recommends a license suspension of "six months and continuing thereafter until it proves it is in compliance with the Act and regulations". However, the record reflects that many of the structural and facility violations have been corrected under Mr. Mattson's management. In addition, the problems that led to the deaths of red deer and sheep have been addressed. Accordingly, I believe that a six-month suspension is not warranted. However, it is unclear from the record whether certain conditions remain unaddressed, and I find it appropriate to suspend Respondent's license for a period of 60 days, during which Respondent must address, at the minimum, these issues:

- Build additional shelters for elk that are acceptable to APHIS
- Develop a better plan of veterinary care that does not assume that every death of an older animal is due to "old age"

- Plan and implement a method of euthanasia endorsed by Respondent's veterinarian and approved by APHIS
- Consult with APHIS regarding the integrity and fitness of its perimeter fence

F. Findings of Fact

1. Action Wildlife Foundation, Inc. is a non-profit corporation which is located at 337 Torrington Road, Goshen, Connecticut.
2. Respondent exhibits a variety of animals that are subject to regulation by USDA APHIS, and Respondent was licensed under the Animal Welfare Act, license No. 16-C-0057 (CX-12) at all times pertinent to this matter.
3. Respondent employs several people who work under the direction of a manager, Mike Matson.
4. Respondent employs a veterinarian who visits the facility and tends to animals.
10. One red deer called "the Terminator" killed thirteen animals of its kind during its lifetime,
11. Respondent eventually began the practice of removing red deer horns to curb aggression in that animal population.
12. Four-horn sheep routinely butted each other with sufficient force to have severed the spinal columns of several animals.
13. Respondent has used gunshot to euthanize animals.
14. Respondent's four-horn sheep regularly destroyed the shelter built in their enclosure, and Respondent redesigned the shelter to allow them to use it, but have the entire enclosure in their vision.

15. Respondent refused to build additional shelters for elk, and maintained that they did not use the shelter that was available, and did not need any additional shelter. Respondent also failed to provide sufficient shelter for red deer.
16. Respondent did not repair gaps in fencing in the bison enclosure because Respondent did not believe anything that could enter the enclosure would pose a threat to the bison.
17. Respondent kept opened bags of food on the floor during a period when the food container area was undergoing repair.
18. Respondent did not remove wire cable from animal enclosures, and did not repair defects in fencing, thereby placing animals at risk of injury.
19. Water receptacles were not kept clean, and water was allowed to accumulate algae.
20. Respondent's perimeter fence did not meet standards, in that gates along the fence caused a breach in continuity and gaps were present in areas around the fence.
21. An inspection revealed that a rabbit was housed with pigs.
22. Respondent failed to provide for the elimination of water in an area where water ran downhill and pooled in animal enclosures.
23. Respondent failed to maintain a sufficient barrier between the Russian boar enclosure and the public, thereby creating risks to both animals and people.
24. Respondent did not promptly remove fallen roof tiles and wire cable from animal enclosures.

G. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. The following violations brought against Respondent are dismissed for lack of proof by a preponderance of the evidence:

- (a) Allegations of violations of 9 C.F.R. §3.125 (a), alleging insufficient structural strength due to holes in concrete block.
- (b) Allegations of violations of 9 C.F.R. § 3.125(a) alleging structural defects of the roof of a building missing shingles.
- (c) Allegations of violation of 9 C.F.R. § 3.127(c), alleging failure to provide adequate drainage in Russian boar pens.
- (h) Allegations pertaining to failure to provide adequate shelter from the elements in the area where caves had been considered as potential shelter. 9 C.F.R. § 3.127(b).

3. The following represent willful violations of the Act and regulations:

- (a) Respondent failed to handle animals (Russian boar) in a manner to prevent risk of harm in violation of 9 C.F.R. § 2.131(c) because there was no barrier fence.
- (b) Respondent failed to provide structural integrity of fencing, by allowing gaps in fencing in violation of 9 C.F.R. § 3.125(a).
- (c) Respondent failed to provide shelter from the elements for elk and red deer in violation of 9 C.F.R. § 3.127(a).
- (d) Respondent failed to meet and maintain the regulatory requirements pertaining to perimeter fencing in violation of 9 C.F.R. § 3.127(d).
- (e) Respondent failed to provide a method to keep food sanitary and free from risk of contamination in violation of 9 C.F.R. § 3.125 (c).
- (f) Respondent failed to develop and maintain a written program of veterinary care in violation of 9 C.F.R. §§ 2.40(a) and 2.40(b)(1)-(5).
- (g) Respondent failed to develop and employ an approved method of euthanasia in violation of 9 C.F.R. § 2.40(a).

- (h) Respondent failed to maintain animals in compatible groups in violation of 9 C.F.R. §3.133.
- (i) Rabbits were housed in the same primary enclosure with other species in violation of 9 C.F.R. § 3.58.
- (j) Respondent failed to remove shingles that had been dislodged from a roof from animal enclosures and failed to store equipment properly in violation of 9 C.F.R. §3.131(c).
- (k) Animals were not provided with potable water and water receptacles were not kept clean in violation of 9 C.F.R. §3.130.
- (l) Respondent failed to employ a sufficient number of adequately trained employees to maintain the expected level of husbandry practices in violation of 9 C.F.R. § 3.132.
- (m) Respondent failed to keep cables from animals and to maintain structures and fencing so as to prevent risk of harm to animals in violation of 9 C.F.R. § 3.125(a).
- (n) Respondent exposed a sugar glider to risk by failing to maintain a lock on its enclosure in violation of 9 C.F.R. § 3.125(a).

4. Respondent's willful violations warrant the imposition of a cease and desist Order, civil money penalties, and a license suspension of sixty (60) days.

ORDER

Action Wildlife Foundation, Inc., and its agents, employees, successors and assigns, directly or indirectly through any individual, corporate or other device is hereby ORDERED to cease and desist from further violations of the Act and controlling regulations.

Action Wildlife Foundation, Inc., shall pay a civil money penalty of thirty-thousand dollars (\$30,000.00). Within thirty (30) days from the effective date of this Order, Respondent

shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

Action Wildlife Foundation, Inc.'s AWA license number 16-C-0057 is hereby suspended for a period of sixty (60) days, during which time Respondent shall take all actions necessary to accomplish the following:

- Build additional shelters for elk that are acceptable to APHIS
- Develop a better plan of veterinary care that does not assume that every death of an older animal is due to "old age"
- Plan and implement a method of euthanasia endorsed by Respondent's veterinarian and approved by APHIS
- Consult with APHIS regarding the integrity and fitness of its perimeter fence

This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

Entered this 29th day of July, 2013 at Washington, DC.

[Redacted]
Janice K. Bullard
Administrative Law Judge